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MAR 2 1984
ALEXANDER L. STEVAS,
CLERK

No. 83-1134

In the Supreme Court of the United States

OCTOBER TERM, 1983

RAYMOND LURCH, PETITIONER

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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Petitioner seeks review of the court of appeals' decision that the United States is not liable under the Federal Tort Claims Act (FTCA), 28 U.S.C. (& Supp. V) 2671 *et seq.*, because the physician who treated petitioner at a Veterans Administration (VA) hospital was not an "employee" of the federal government.

1. On May 19, 1976, petitioner was admitted to the VA hospital in Albuquerque, New Mexico, for an operation designed to relieve severe pain he was experiencing on the left side of his face (Pet. App. A3 & n.1). Petitioner's physician, Dr. Ralph Kaplan, a specialist in neurosurgery, was a member of the faculty at the University of New Mexico School of Medicine, and, pursuant to a contract between the VA and the University, he regularly provided specialized neurological services for the hospital (*id.* at C2). Dr. Kaplan diagnosed the problem as a damaged trigeminal nerve that had been injured in an earlier accident. He proposed to sever the nerve and thereby cut off the painful

sensations it was delivering to petitioner's face. Unfortunately, the operation was not successful. Not only did petitioner's pain in his face return, but also he lost all hearing in his left ear. *Id.* at A3.

Petitioner filed suit against the United States under the Federal Tort Claims Act, 28 U.S.C. (& Supp. V) 2671 *et seq.*, in the United States District Court for the District of New Mexico, alleging that the VA was responsible for Dr. Kaplan's negligence in treating petitioner's condition. The United States filed a third-party complaint against the Regents of the University and Dr. Kaplan and filed a motion for summary judgment against petitioner, arguing that it was not liable because Dr. Kaplan was not an "employee" of the United States within the meaning of 28 U.S.C. (& Supp. V) 1346(b) and 2671.

The district court granted the government's motion and entered judgment against petitioner (Pet. App. C1-C4).[1] The court found that, under the contract between the University and the VA, the University agreed to provide neurological services by one or more neurosurgeons selected by the School of Medicine; the University also assumed full responsibility to take care of the physicians' worker's compensation, insurance, health benefits and social security payments; Dr. Kaplan was paid solely by the University and received no money from the VA; the VA did not supervise Dr. Kaplan's exercise of medical judgment; and Dr. Kaplan was free to perform any neurologically related surgery using any method or instruments of his choice (*id.* at C2-C3). Based on these findings, the district court concluded that Dr. Kaplan was not an "[e]mployee of the [federal] government" within the meaning of 28 U.S.C. (& Supp. V) 1346(b) and 2671.

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[1]The district court also dismissed as moot the government's third-party complaint against Dr. Kaplan and the Regents of the University (Pet. App. C4).

The court of appeals affirmed (Pet. App. A1-A16). Initially, it expressed some doubt about how the "government control" test for deciding whether a contractor is a federal employee under Section 2671 should be applied when the contractor is providing specialized medical care, which by its nature does not permit supervision. The court found it unnecessary to resolve the problem in this case, however, because "the contractual arrangement itself and its application placed Dr. Kaplan outside the parameters of an employer-employee relationship with the Government" (Pet. App. A8). In this regard, the court noted that the contract expressly stated that the medical personnel supplied to the VA by the University " 'shall not be considered VA employees for any purpose' " (*ibid.* (citation omitted)).[2]

2. Petitioner argues (Pet. 7-9) that the court of appeals erred by relying primarily upon the contract between the VA and the University instead of more mechanically applying a "day-to-day supervision" or "control" test. Petitioner's argument erroneously assumes, however, that the contract is not itself directly relevant to the basic issue of the federal government's control over the contractor. In *Logue* v. *United States*, 412 U.S. 521, 529-530 (1973), this Court relied heavily upon the contract between the Bureau of

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[2]The court of appeals also rejected petitioner's alternative argument that 38 U.S.C. 4116(a), which makes the Federal Tort Claims Act the exclusive remedy for certain medical malpractice suits, creates an exception to the ordinary FTCA rule that the United States is not liable for the negligence of its independent contractors. The court of appeals stated that "we do not read the statute to increase or expand the available remedies against the United States" (Pet. App. A12). Furthermore, the court found that the rest of the provision, which authorizes the Attorney General to defend these suits and which provides for removal to federal court of suits arising out of actions within the scope of the defendant's employment, 38 U.S.C. 4116(b) and (c), strongly indicated that Congress intended 38 U.S.C. 4116(a) to apply "only to federal employees acting within the scope of their employment" (Pet. App. A13).

Prisons and the local county jail in deciding that the United States lacked authority to control the sheriff's employees and therefore that they were not employees of the federal government. Similarly, here, where control over the basic terms and conditions of Dr. Kaplan's employment remained with the University pursuant to its contract with the VA, there is no basis for finding that Dr. Kaplan was an employee of the federal government.

Nor is *United States* v. *Orleans*, 425 U.S. 807 (1976), contrary to the decision below. In that case the Court held that a recipient of an Office of Economic Opportunity (OEO) grant who must comply with federal standards in using the federal money was an independent contractor unless the government supervised the day-to-day operations of the grantee. But in deciding whether there was supervision, the Court only considered how Congress had structured the relationship between the OEO and its grantees and did not discuss any actual proof of supervision. In this case the relationship between the VA and the University was contractually defined. Accordingly, the court below properly focused on the terms of the contract.[3]

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[3]The court of appeals was clearly correct in holding that the VA's "control" over the operation of the hospital, which indirectly affected some aspects of the neurosurgeons' activities at the hospital, was not sufficient to make Dr. Kaplan a federal employee (Pet. App. A9 n.9). See *United States* v. *Orleans*, 425 U.S. at 817-818; *Logue* v. *United States*, 412 U.S. at 529-530.

Petitioner emphasizes (Pet. 8) the court of appeals' comment that the "control" test might require modification in cases involving physicians because otherwise it would be "doubtful whether a physician could ever be found to be a federal employee under the FTCA" (Pet. App. A8 (footnote omitted)). Although not crucial to the proper disposition of this case, the court's comment is inaccurate. The "control" test is only a matter of concern where there is not otherwise a clear employer-employee relationship. The VA directly employs a large number of physicians, and the United States is potentially liable for claims that those physicians acted negligently.

3. Petitioner argues (Pet. 10-11) that 38 U.S.C. 4116(a) constitutes a waiver of the United States' immunity for all claims of negligent medical treatment in VA hospitals. The court of appeals correctly rejected this contention. Section 4116(a) on its face does not create any new governmental liability; instead, it simply insulates physicians and other medical personnel who work at VA hospitals from personal liability *where a remedy against the United States under the FTCA is available*. See *Johnson* v. *United States*, 547 F.2d 688, 693 n.33 (D.C. Cir. 1976). This reading is directly supported by the reference in 38 U.S.C. 4116(a) to the Federal Tort Claims Act provisions, which obviously apply only to federal employees.

Moreover, as the court below correctly determined (Pet. App. A13), the rest of Section 4116 supports the interpretation that it is limited to federal employees. It is most unlikely that Congress meant to authorize the Attorney General to defend suits against non-federal employees or to remove to federal court suits against private individuals based on acts within the scope of their employment. Cf. 28 U.S.C. 2679(b) (analogous provision of Federal Drivers Act); *Tunder* v. *United States*, 522 F.2d 913 (10th Cir. 1975).[4] In short, nothing in 38 U.S.C. 4116(a) indicates that it is a sweeping waiver of sovereign immunity for claims based on injuries caused by independent contractors that provide health care on behalf of the federal government. See *United States* v. *Mitchell*, 445 U.S. 535, 538 (1980) (waivers of sovereign immunity may not be implied but must be unequivocally expressed).

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[4]The legislative history of 38 U.S.C. 4116 demonstrates that the statute was modeled after the Federal Drivers Act, which makes the United States the exclusive defendant in actions arising out of automobile accidents caused by federal employees acting within the scope of their employment. See S. Rep. 861, 89th Cong., 1st Sess. 3 (1965).

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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MARCH 1984

DOJ-1984-03